IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,

Appellant,

—v.—

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND MARYLAND BRANCH, ACLU, *AMICI CURIAE*

EDWARD DE GRAZIA
1001 Connecticut Avenue, N.W.
Washington 36, D. C.

MELVIN L. WULF
156 Fifth Avenue
New York 10, New York

Attorneys for Amici Curiae

INDEX

AUTHORITIES CITED

Cases:

PAGE

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,

Appellant,

—v.—

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND MARYLAND BRANCH, ACLU, *AMICI CURIAE*

Interest of *Amici*

Amici filed this brief (with the consent of the parties on file in the Clerk's office) because of their support over the past forty-four years of the greatest freedom, under the First Amendment, for all forms of expression. We believe that the Maryland Statute which requires the prior censorship of motion pictures constricts that freedom and violates the First Amendment.

Questions Presented

Whether a state may restrain the public exhibition of a motion picture in advance of a judicial determination that the motion picture is of a character which governmental authority may properly suppress.

Statement

Appellant, manager of a commercial motion picture theatre, exhibited the film "Revenge at Daybreak" without obtaining permission of the Maryland Motion Picture Censor Board. An employee of the Board viewed the film and secured a warrant for appellant's arrest for failure to comply with Section 2 of Article 66A of the Maryland Code which makes it a crime to exhibit certain types[1] of motion picture films in Maryland unless the film has been submitted to and approved by the Board.

The Board is instructed by the law to approve such films "as are moral and proper" and disapprove such "as are obscene or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." Any employee or member of the Board may enter any place where films are exhibited and prevent the exhibition of any film not approved by the Board (Sec. 14). Appellant was indicted, tried, convicted and fined for violation of Article 66A. No finding was made by the Board, by its employee, or by any other forum at any time, that the film exhibited was "obscene" or otherwise of a kind tending "to debase or corrupt morals or incite to crime." On appeal, the Mary-

[1] Among films not required to be submitted to or approved by the Board are films commonly called "news reels" (Sec. 6a) and any films of whatever nature exhibited on a non-commercial basis (Sec. 23).

land Court of Appeals affirmed the action, relying upon this Court's opinion in *Times Film Corp.* v. *Chicago*, 365 U. S. 43.

Argument

The State of Maryland contends that, in the exercise of its police power, it may legitimately punish a person for the reason alone that he showed a motion picture film, the contents of which Maryland had not approved as "moral and proper." It is conceded by Maryland that had it been given the opportunity by Appellant, the film would have been approved. In seeking thus to preserve intact its licensing system for the censorship of motion pictures, against Appellant's complaint that his arrest, conviction and punishment deprived him of his rights of free expression under the First and Fourteenth Amendments, Maryland is asking this Court to uphold a classic system of prior restraint.[2] It is submitted this system can be preserved intact only at the cost of undermining an indispensable pillar of free expression in this country. The system ought not be preserved intact, for Maryland's interest in protecting its people from films it considers "immoral" or "improper" weighs as nothing against that people's interest in gaining free access to the motion pictures of their choice.

---

[2] This particular type of system appears to exist in more-or-less the same form in only three other states (New York, Virginia and Kansas), and two municipalities (Chicago and Detroit). Consult: Appendix A (State and Municipal Motion Picture Censorship Laws) hereto; Milner, *Sex on Celluloid* at 188 and Appendix B; 1964 International Motion Picture Almanac at 736-737. Laws of the same type were recently found to be invalid systems of prior restraint notwithstanding *Times Film Corp.* v. *Chicago*, *infra*, under State constitutional guarantees of free expression in Pennsylvania and Georgia. *Goldman* v. *Dana, Twentieth Century-Fox* v. *Boehm*, 405 Pa. 83, 173 A. 2d 59 (1961), cert. den. 368 U. S. 897; *Murray Productions, Inc.* v. *Floyd*, 217 Ga. 784, 125 S. E. 2d 207 (1962).

The American Constitutional abhorrence of systems of licensing and prior restraint is generally traced back to 17th century England's experience with total prohibitions upon unlicensed printing, and Blackstone's famous derivative commentary in the century that followed:

> "the liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 Bl. *Comm.** 151.

Near v. *Minnesota*, 283 U. S. 697, was the American case which first gave substantial judicial recognition to the pernicious character and tendency of previous restraints, while the annals of the Court since then have regularly reflected both the tenacious capacity of local governments to generate such restraints and the overriding concern of the Court to nullify them in their most dangerous aspects, if not *in toto*.[3]

This Court has long admonished that any such system of naked licensing and censorship comes before it "bearing a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U. S. 58; *Near* v. *Minnesota*, 283 U. S. 697; *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290; *Staub* v. *Baxley*, 355 U. S. 313. With respect particularly to a system of motion picture licensing, this Court determined thirteen years ago that such a previous restraint was a form of infringement "to be especially condemned." *Burstyn* v. *Wilson*, 343 U. S. 495.

Still, the Court has not always incapacitated the systems of restraints summoned before it. Thus, although it "con-

---

[3] See, *e.g.*, the cases cited by the Chief Justice in his dissent to *Times Film Corp.* v. *Chicago*, *supra*.

demned" the State of New York's motion picture licensing law for requiring that "permission to communicate ideas be obtained in advance from State officials who judge the content of the words and pictures sought to be communicated," *Burstyn* v. *Wilson, supra,* the Court did not gainsay the City of Chicago's insistence upon "requiring the submission of films prior to their public exhibition." *Times Film Corp.* v. *Chicago,* 365 U. S. 43.[4] The net of the Court's pronouncements to date, as applied particularly to films and publications, appears to have been that of declining to declare "all prior restraints on speech are invalid," yet insisting that limitations on the principle which would invalidate all prior restraints can be "recognized only in exceptional cases." In short: "the phrase 'prior restraint' is not a self-wielding sword. Nor can it be a talismanic test." *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436; *Times Film Corp.* v. *Chicago, supra.* Needed, doubtless, is a middle path between a rule which might cancel all prior inhibitions to expression, and an exception so loose as could swallow the rule whole.[5] A series of recent cases may have opened up such a path.

A main trouble with licensing systems and other prior restraints is that:

> "they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration." Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. 648, 658.

---

[4] The Chief Justice vigorously dissented: "Let it be completely clear what the Court's decision does. It gives official license to the censor, approving a grant of power to city officials to prevent the showing of any moving picture these officials deam unworthy of a license. It thus gives formal sanction to censorship in its purest and most far-reaching form."

[5] Compare Freund, *The Supreme Court and Civil Liberties,* 4 Vand. L. Rev. 533, 539.

This has proven to be the case whether the evil matter to be exorcised by the censor was "malicious, scandalous and defamatory" (*Near* v. *Minnesota, supra*), "obscene, lewd, lascivious or filthy" (*Manual Enterprises* v. *Day*, 370 U. S. 478; *Walker* v. *Popenoe*, 149 F. 2d 511; *Sunshine Book Company* v. *Summerfield*, 221 F. 2d 42; cert. den. 349 U. S. 921), "sacrilegious," "prejudicial," "immoral," "sexually immoral" or "harmful." (*Burstyn* v. *Wilson, supra; Gelling* v. *Texas*, 343 U. S. 960; *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684; *Superior Films* v. *Department of Education*, and *Commercial Pictures* v. *Regents*, 346 U. S. 587). Indeed, perhaps all prevailing standards for censorship will, sooner or later, be confessed to be irreducibly, impossibly, vague.

The insidious elements contained in most systems of prior restraint include: the sweeping scope of the censor's scythe, the inordinate breadth of his surveillance;[6] the tendency for the communication to be *absolutely, i.e.*, for all time, suppressed;[7] the natural propensity of the decision to be

---

[6] "It subjects to government scrutiny and approval all expression in the area controlled—the innocent and borderline as well as the offensive, the routine as well as the unusual. The machinery is geared to universal inspection, not to scrutiny in particular cases which are the subject of complaint or otherwise come to the attention of prosecuting officials." Emerson, *op. cit. supra* at 656; compare Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra.*

[7] "Under a system of subsequent punishment. the communication has already been made before the government takes action; it thus takes it place, for whatever it may be worth, in the market place of ideas. Under a system of prior restraint. the communication, if banned, never reaches the market place at all. Or the communication may be withheld until the issue of its release is finally settled, at which time it may have become obsolete or unprofitable. Such a delay is particularly serious in certain areas—such as in motion pictures—where large investments may be involved." Emerson, *op. cit. supra* at 657; Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra:* "The delays in adjudication may well result in irreparable damage, both to the litigants and to the public. *The Miracle* . . . was never shown in Chicago."

adverse to free expression;[8] and the frequent unavailability of criminal or even adversary procedural protection; the narrow scope and tardiness of any available judicial review; the relative secrecy of the proceedings and absence of public scrutiny and criticism; finally, the typical incapacity of the officials involved to apply necessary aesthetic or other relevant criteria or make the sensitive Constitutional judgments required in most such cases.[9] The trouble is greatly aggravated where the standard for the censor's action is so vague (even if not too vague for Constitutional "due process") as to set him "adrift upon a boundless sea amid a myriad of conflicting currents . . .", *Burstyn* v. *Wilson, supra.*

---

[8] "A communication made is a *fait accompli*, and the publisher has all the practical advantages of that position. A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment—the expenditure of time, funds, energy, and personnel that will be necessary. Under a system of prior restraint he can reach the result by a simple stroke of the pen. Thus, in one case, the burden of initial action falls upon the government; in the other, on the citizen. Again, once a communication has been made, the government official may give consideration to the stigma and the troubles a criminal prosecution forces upon the citizen. Before the communication has been issued, however, such factors would not enter the picture. For these and similar reasons, a decision to suppress in advance is usually more readily reached, on the same facts, than a decision to punish after the event." Emerson, *op. cit. supra* at 657. Compare Paul and Schwartz, *Federal Censorship* at 224-228; Douglas, J., dissenting in *Times Film Corp.* v. *Chicago, supra.*

[9] See Emerson, *op. cit. supra* at 657; Douglas, J., dissenting in *Times Film Corp.* v. *Chicago, supra:* "One stroke of the (censor's) pen is all that is needed. Under a censor's regime the weights are cast against freedom . . ."; Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra:* "The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence. . . . How different from a judicial proceeding where a full case is presented by the litigants"; Chafee, *Free Speech in the United States*, at 533; Haney, *Comstockery in America* at 176.

It is perhaps only since *Burstyn* that this Court has come to realize how even the standard of "obscenity" leaves censors recklessly adrift, and that close judicial superintendence, reaching as high as necessary, may be the only means of assuring freedom for expression which is not prurient, patently offensive, and utterly worthless, and thus unable to lay claim to Constitutional protection, under the decisions of this Court.[10] *Jacobellis* v. *Ohio*, 378 U. S. 184; *A Quantity of Books* v. *Kansas*, 378 U. S. 205; *Grove Press* v. *Gerstein*, 12 L. Ed. 2d 1035; *Manuel Enterprises* v. *Day*, 370 U. S. 478; *Bantam Books* v. *Sullivan*, 372 U. S. 58.

A system of prior restraint over communication geared to standards like "obscenity" ought to be allowed by this Court to function, if at all, only if due allowance has been, or can be, made to nullify the system's natural vices. One requirement must be for a judicial superintendence of the system's actions so close as to be either immediate or part and parcel of the system itself. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 346;[11] *Marcus* v. *Search Warrants*, 367 U. S. 717; *A Quantity of Books* v. *Kansas, supra.*

---

[10] Licensing Systems have been sometimes defended, and sometimes tacitly supported, even by the persons and concerns censored and licensed, because of the opportunity afforded to "find out what is forbidden without incurring the danger of criminal or similar sanctions" if the person's or concern's uncensored judgement or interpretation of the law, were wrong. (See *Emerson, op. cit. supra* at 659). From the public and constitutional viewpoint, of course, almost nothing could be worse than a system which efficiently and quietly and happily works to censor our media of communication and expression. As little as may perhaps be done by the Courts to prevent such censorship as takes places under private auspices, there should be no hesitation in voiding on Constitutional grounds any such system of governmentally imposed and enforced licensing. See *Bantam Books* v. *Sullivan, supra.*

[11] In his dissenting opinion the Chief Justice observed: "Certainly, *in the absence of a prior judicial determination* of illegal use, books, pictures and other objects of expression should not be destroyed."

In his dissent in *Times Film Company* v. *Chicago, supra*, he found the Chicago film censorship plan defective in that it "makes

In addition, there must be adequate notice and full opportunity for an adversary hearing prior to the imposition of any effective restraint. *Walker* v. *Popenoe*, 149 F. 2d 511; *Sunshine Book Co.* v. *Summerfield*, 221 F. 2d 42, cert. den. 349 U. S. 921; *Kingsley Books, Inc.* v. *Brown, supra; Marcus* v. *Search Warrants, supra; A Quantity of Books* v. *Kansas, supra; Bantam Books* v. *Sullivan, supra; cf. Manuel Enterprises* v. *Day, supra* (concurring opinion of Mr. Justice Brennan).

If the Maryland system for the licensing of motion picture expression is examined in these respects, it appears notably deficient. As constituted by the Maryland legislature, the Maryland system makes no allowance for any judicial check whatsoever upon the conclusions drawn or actions taken by the Board of Censors, or indeed by any member or employee of the Board, with respect to a particular film—until *after* the restraint upon circulation is imposed. If a person submits his film in advance to the Board it may be disapproved and its exhibition restrained without recourse to a Court; if a person shows his film without submitting it in advance to the Board, the Board or any of its employees may—according to Maryland's contentions here—suppress its exhibition. This can be done, as here, by procuring a warrant for the arrest of that exhibitor on the ground, and upon a showing, not that he has shown or is about to show an "obscene" film, but on the ground or upon a showing that he has shown, or is about to show, "a film." Here, then, is no room at all for that "judicial superintendence" (*Bantam Books* v. *Sullivan, supra*), that "adversary hearing" (*A Quantity of Books* v. *Kansas, supra*) that "adequate notice, judicial hearing, and fair de-

---

no provision for prompt judicial determination" and that "the censor performs free from all procedural safeguards afforded litigants in a court of law."

termination". (*Kingsley Books, Inc.* v. *Brown, supra*) already laid down by this Court as minimum requisites to support a licensing system otherwise so directly obnoxious to the Constitutional canons and traditions of our free society that it does not shrink from describing its chief organ as the "State Board of Censors" (Section 2), nor from compelling every film audience in the State "captively" to view at each performance four feet of film certifying that the film to be viewed was found by the State to be moral and proper. (Sections 7 and 22.)

Failing to conform to minimum Constitutional requisites of a prior judicial hearing and determination, Maryland's film censorship law cannot prevail against a person punished for refusing to submit thereto. It should be faced that, as a consequence, Maryland's Board of Censors should in future be unable to prevent a film from being shown—prior to a time when it or others might be able to cause a criminal prosecution to be brought, or a judicial restraining order or injunction to be issued against further showings. This much social "risk" is Constitutionally imperative and has long been assumed by most of our States and municipalities. (See authorities cited, note 2, *supra*.) As much was long ago also recognized, for example, in connection with the Post Office's efforts to restrain "obscenity" from passing through the mails. As Judge Thurman Arnold said:

> "We are not impressed with the argument that a rule requiring a hearing before mailing privileges are suspended would permit, while the hearing was going on, the distribution of publications intentionally obscene in plain defiance of every reasonable standard. In such a case the effective remedy is the immediate arrest of the offender for the crime penalized by this statute. . . . But often mailing privileges are revoked in cases where

> the prosecuting officers are not sure enough to risk criminal prosecution. That was the situation here. Appellees have been prevented for a long period of time from mailing a publication which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury." *Walker* v. *Popenoe, supra.*[12]

It has been this nation's birthright, and its continual learning as well, with regard to all the other principal media of expression, that no office should have any chance to examine material in advance nor to restrain any from circulation. Few other features of our press have so sharply marked it off from those which obtain in totalitarian and less democratic nations and regimes, friendly and unfriendly. There is no reason why our motion picture exhibitors can validly be hobbled in this respect where our newspapers and magazine distributors, our phonograph record outlets, our radio and television broadcasters, cannot. While the home television screen may be considered the closest to motion picture projection, in form and impact, no power of the Federal Communications Commission or of any local government agency could be claimed, or applied, to withhold from appearance at any time, in American homes, of "obscene," "immoral," or "improper" pictures. No power, that is, greater than the threat of subsequent punishment—by fine, imprisonment and/or loss of broadcast license. See *Allen B. Dumont Labs.* v. *Carroll,* 184 F. 2d 153, cert. den. 340 U. S. 929. And though this

[12] The unconstitutionality of the Post Office power to stop mail it considers obscene, without a prior hearing, has not been squarely ruled upon by this Court. As Mr. Justice Brennan's concurring opinion in *Manuel Enterprise* v. *Day, supra,* intimates, the power is almost certainly inconsistent with the guaranties of free expression.

Court has suggested that in times of national emergency, the government might seek to restrain "the publication of the sailing dates of transports or the number and location of troops" (*Near* v. *Minnesota, supra,* at 716), it has never been suggested that even in such a perilous moment, all our newspapers could be compelled to submit their issues to examination in advance of sale. (See Warren, C. J., dissenting in *Times Film Corp.* v. *Chicago, supra.*)

Section 2 of the Maryland motion picture censorship Act thus cannot be allowed to stand as valid support for the punishment of a motion picture exhibitor who chooses to show a film without approval of Maryland's Board of Censors. Other parts of the law are highly questionable.[13] As to Section 17's requirement that Maryland's Board of Censors be provided with a copy of each film to be shown, this much may not necessarily be repugnant to Constitutional requirements, *and* this may be all that *Times Film Corp.* v. *Chicago, supra,* was meant to, or need, stand for.

> "We have concluded that [the section] of Chicago's ordinance requiring the submission of films prior to their public exhibition is not, on the grounds set forth, void on its face."

Any mis-use by the Board of any such residual prerogative to offer advisory opinions,[14] any mis-use in the manner, for example, of the activity engaged in by the Rhode Island Commission to Encourage Morality in Youth (*Bantam*

[13] Sections 14 and 16 purport to extend to Board members and employees the unreasonable power to search theatres without a warrant and privately arrest any showings. Art and entertainment films are discriminated against, as compared with news films, by Section 6a. Commercial films are discriminated against, as compared with "non-profit" showings, by Section 23. The tax imposed may be void under *Grosjean* v. *American Press Co.*, 297 U. S. 233.

[14] See note 10 *supra.*

Books v. *Sullivan, supra*), would present another case. Here and now it may be enough to recognize that Appellant's conviction for violating Section 2 must be reversed. He was arrested, tried and convicted in clear violation of his Constitutional rights to exhibit a film free of prior administrative restraint, free of censorship.

CONCLUSION

For the reasons stated above, the conviction must be reversed.

Respectfully submitted,

September 1964.

EDWARD DE GRAZIA
1001 Connecticut Avenue, N.W.
Washington 36, D. C.

MELVIN L. WULF
156 Fifth Avenue
New York 10, New York
Attorneys for Amici Curiae